United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

For the Second Circuit

No. 74-1220

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

VINCENT ALOI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S RESPONSE TO GOVERNMENT'S ANSWER TO POINT I OF APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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INTRODUCTION

After his convictions for conspiracy, use of a false offering circular and wire fraud were affirmed by this Court on January 31, 1975 (Feinberg and Moore, CCJ, Palmieri, D.J.), on February 28, 1975 Vincent Aloi filed a Petition for Rehearing and Rehearing En Banc (hereinafter the "Petition").

On or about May 25th, this Court ordered the government to respond to Point I of the Petition, and on June 2, 1975, they did so.[1] Appellant

[1] The document filed, entitled "Answer for the United States of America to Point I of the Petition for Rehearing and Rehearing En Banc of Appellant Vincent Aloi" will be referred to hereinafter as the "government answer."

then moved for permission to file a response on or before June 18; that motion was granted on June 16 and the instant document constitutes his response.

Appellant does not intend either to repeat the arguments already made[2] or to rebut each separate argument attempted by the government.[3] Rather, appellant will briefly discuss three areas in which the answer is misleading or confusing, i.e., the confusion of vicarious liability under Pinkerton v. United States, 328 U.S. 640 (1946) with the necessity of a finding of willfulness under Count 18, the appellant's proper reliance under Rule 30 on a request to charge which was not denied by the trial court, and the basic irrelevance of the so-called Soldano charge to the issues presented in this case.

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[2]Contained both in his Petition, and in the Brief and Reply Brief of Appellant Dioguardi, where the issues were initially raised.

[3]Many of the arguments made in the government answer have already been dealt with in the Dioguardi Reply Brief at pp. 1-10 and 13-18 and we will not burden the Court with undue repetition here.

I.

THE FAILURE TO CHARGE WILLFULNESS WAS REVERSIBLE ERROR

Aloi was convicted of Count 18, the "willful use of a false and misleading offering circular."[4] As previously argued,[5] willfulness is an essential element of the crime, see, e.g., United States v. Robertson, 298 F. 2d 739 (2d Cir. 1962);[6] as in other crimes where the act in question is not a malum in se,[7] but requires a particular state of mind for the imposition of criminal sanctions, the failure to instruct the jury as to the requisite willfulness, knowledge or intent of the actor requires

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[4]The indictment properly charged this crime as a violation of 15 U. S. C. sections 88(x), 77(s)(a), Rule 256(e) (17 C. F. R. section 230. 256[e]) and Form 1A, Schedule I as promulgated thereunder.

[5]Aloi Petition, pp. 5-8, Dioguardi Brief, pp. 36-40.

[6]In Robertson, the Court reversed two convictions on two securities fraud counts where willfulness was not charged, notwithstanding affirmance of other counts where the sentences ran concurrently, so as not to approve "even by indirection," so insufficient a charge (id. at p. 740). For a general discussion of the willfulness requirement in 77(x) cases, see Mathews, Criminal Prosecutions Under the Federal Securities Law, 39 Geo. Wash. L. Rev. 901, 950 (1971). 1 Loss, Securities Regulation, p. 1309 (1961 ed.). In this case, of course, Aloi received an additional four year sentence on Count 18, to run consecutively with his five-year conspiracy sentence.

[7]The failure to obey the provisions of the Securities Act of 1933, and, as here, the rules and regulations promulgated thereunder, normally gives rise only to civil sanctions. It is only the addition of willfulness as set forth in 15 U. S. C. section 77(x) which makes violation or noncompliance criminal.

reversal; see, e.g., United States v. Byrd, 352 F.2d 570, 572-74 (2d Cir. 1965); United States v. Robertson, supra; United States v. Gillilan, 288 F.2d 796 (2d Cir. 1961); United States v. Ausmeier, 152 F.2d 349, 356-57 (2d Cir. 1945); United States v. Kronsby, 418 F.2d 65 (6th Cir. 1969) and constitutes "plain error," even in the absence of objection; e.g., United States v. Byrd, supra, and United States v. Kronsby, supra.

There is no question that in instructing the jury on Count 18, the trial court never mentioned that the alleged "use of a false and misleading offering circular" had to be willful; additionally, there was evidence from which the jury could have found inadvertence, negligence or mistake.[8] If this were all, reversal would be required under all the cases cited above.

But the situation in the instant case, although clearly worse, was also more confusing. The government, in its argument, has attempted to employ its very bizarreness to justify what would otherwise be entirely unjustifiable.

It must be remembered that in this case there was no claim that Aloi actually committed the crime charged in Count 18; his guilt, and that of his co-defendants, was premised entirely on the vicarious liability theory of Pinkerton v. United States, supra.

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[8]See, e.g., Dioguardi Brief, pp. 38-39; Aloi Brief, pp. 26-29; Dioguardi Reply Brief, pp. 17-19.

In order to support a finding of guilt under Pinkerton this Court has held that the jury must find three distinct elements, each beyond a reasonable doubt. They are:

> (1) That the substantive crime was committed;
> (2) that it was in furtherance of the conspiracy, and
> (3) that at the time the crime was committed the defendant sought to be held vicariously liable was a member of the conspiracy.[9]
>
> United States v. Cantone, 426 F. 2d 902, 904 (2d Cir. 1970)

The court in the instant case charged only the second and third elements, completely omitting the sine qua non of commission of a substantive crime.[10] For the first element, it substituted a jury finding of an act which violated only the civil provisions of the Securities Act because it

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[9]Aloi has argued extensively that in the facts of the case this third requirement also bars a finding of his guilt on Count 18. See, e.g., Aloi Petition, pp. 13-14.

[10]A leading commentator on securities law has found that courts in securities fraud cases often do not discuss what he calls the "independent wrong requirement" because that wrong (and in the context of criminal, rather than civil penalties, that "crime") is generally easily established. But, he cautions, "Even though the independent wrong is easy to establish in most aiding and abetting and conspiracy cases, exact identification of the wrong is essential in order to determine which persons should be subject to liability for . . . agreeing with the primary participants in the wrongdoing." Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, Contribution, 120 U. Pa. L. Rev. 597, 630; see generally pp. 620-46. While Ruder speaks generally of civil sanctions he recognizes the even more stringent requirements in criminal prosecutions and his warning is equally relevant to those cases.

need not have been done willfully but could have been the result of negligence, error or mistake.

The absolute requirement that someone be found to have committed the requisite crime, and that that requisite crime had to be committed willfully, is underscored by the government's own request. See Aloi Petition, Appendix B.

The government now attempts to evade its own legally compelled conclusion by arguing, in essence, that the "willfulness" which the jury had to find to admit Aloi to the conspiracy somehow also becomes the requisite willfulness for a crime committed by another.[11] This confusion of vicarious liability and requisite criminal intent would extend

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[11] The cases cited by the government for this "proposition" are entirely inapposite. The Bryan and Barr cases cited at p. 19 are not Pinkerton cases, but rather hold that one charged as an aider and abettor may be liable for acts which he willfully causes an innocent intermediary to perform. In such cases, the fact that his "cat's paw" has no criminal intent is irrelevant. But as this was not the theory upon which the court submitted the case to the jury, it cannot be used to sustain the conviction on appeal. See, e.g., United States v. Hernandez, 290 F. 2d 86, 91 (2d Cir. 1961) and other cases cited in the reply brief of Appellant Dioguardi at p. 14. The Weisscredit and Lester cases involve a different principle of conspiracy law -- that one who lacks capacity to commit an offense (in those cases, one who because not a public official, could not himself act "under color of state law") can nevertheless be convicted of conspiring to cause commission of that offense by one having capacity. Again, this principle is entirely separate from the Pinkerton theory of vicarious guilt which requires that the crime actually be committed.

Pinkerton far beyond its present bounds,[12] maing every overt non-criminal act a potential additional substantive offense, and raising the most serious questions of due process and double jeopardy.

Where the failure to charge willfulness would invalidate the conviction of the person who actually committed the alleged crime, ignoring the same plain error in convicting one whose liability is once further removed violates all notions of logic and common sense and should not be permitted by this Court.

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[12] The Pinkerton theory has frequently been criticized as coming dangerously close to destroying the requirement of mens rea for criminal conviction; leading commentators have urged that rather than expanding Pinkerton, it should be carefully and narrowly applied because of "the dangers inherent in making conspiracy itself a basis of substantive liability," e.g., Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959).

II.

THE FAILURE TO CHARGE WILLFULNESS WAS PLAIN ERROR

Although we do not concede that appellant in any way waived the issues raised herein, the failure to charge an essential element of the crime was clearly "plain error" within the meaning of Rule 52, Fed. Rules Crim. Proc., requiring reversal even in the absence of objection. See Aloi Petition at pp. 8-9 and p. 4, supra.

Without repeating that argument we would mention only that United States v. Pravato, 505 F. 2d 703 (2d Cir. 1974), cited by the government (Govt. Answer, p. 26) in no way vitiates the holdings of the decisions we have cited for this proposition, not their applicability to the instant case. In Pravato, unlike this case, the jury was told precisely what the elements of the crime charged were; the error, unobjected to by counsel apparently for tactical reasons, was rather that they erroneously believed that some of those elements were conceded as proven. United States v. Howard, 506 F. 2d 1131, 1134 (2d Cir. 1974). The failure to charge an essential statutory element remains plain error in this Circuit. United States v. Howard, id.

III.

THERE WAS NO WAIVER UNDER RULE 30

Aloi has argued[13] that there was no Rule 30 waiver of his claims of error in the charge because after being shown the Soldano charge (see IV, infra) the government filed extensive requests to charge including a request on willfulness.[14] While the various defendants filed objections to a number of those requests,[15] no objection was made to the government requests on Count 18 on willfulness. Accordingly, we have argued, Aloi and the other defendants were entitled to rely on the formal requests made, particularly where no objection was taken, and where the judge did not inform counsel that the requests would not be

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[13] The government claims that this argument was made for the first time in Aloi's petition for reargument (Govt. Answer, p. 24). This is untrue. The issue of waiver was first raised in the government's original Answering Brief and was responded to, as here, in the Reply Brief of Appellant Dioguardi at pp. 7-10. That brief was adopted by reference by the instant appellant.

[14] The requests to charge on Count 18 and the general request on willfulness are respectively Appendices "B" and "B1" of Aloi's Rehearing Petition.

[15] For example, the defendant Dioguardi filed written requests to charge registering objection to specific government requests, designated by number (specifically to Government Requests 2-9, 12-16, 34, 35, 38 and 40) and proposing alternate language. As in every other instance of the trial, requests and objections by one defendant were deemed joined in by all. Copies of Dioguardi's requests were handed up to the original panel at oral argument and are part of this Court's file on appeal.

honored.[16]

In our reading of Rule 30,[17] this latter fact is most significant. The purpose of the rule is to give counsel an opportunity to tell a trial judge what they want, and for him to inform them, prior to giving his charge, what they will get. At the completion of the charge, having been alerted to what has been omitted,[18] counsel must determine whether to object. Where the judge does not inform the parties that he refuses to charge as they have requested, they should not, pursuant to the statutory scheme, be deemed to have waived the "objections" presented in their proposed charges.

We realize that this is a question of first impression,[19] but believe

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[16] In fact, subsequent to the submission of proposed request, the judge told the government that he basically agreed with them on the law.

[17] The rule provides that any party may file written requests which must be furnished to adverse parties and that "The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury." Fed. Rules Crim. Proc., Rule 30.

[18] The clear intent of the Rule is to avoid what happened here; i. e., counsel, who were not previously alerted to omissions from the requests to charge, missing these omissions in the heat of the trial.

[19] Counsel has found no case where a request has been filed, where that request was not honored, and where no subsequent objection was taken. Additionally, there is virtually no decisional discussion of the second of the three steps contemplated by Rule 30 -- the necessity of the trial judge's action on counsel's requests prior to charge -- although, as we have argued, the Rule itself makes this mandatory and it appears to be a sine qua non for the final provision.

that the analogous cases,[20] the clear statutory scheme and intent, and the particular facts of this case require a finding that reliance on the explicitly stated written requests to charge on Count 18 and willfulness satisfy Rule 30 and that there was no waiver thereof.

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[20] The government claims that reliance on the cases cited by Aloi is "misplaced" (Govt. Answer, p. 24), but apparently ignores the introductory signal which preceeds them. As we have said above, fn. 19, supra, there are no cases on point; the cases we have cited suggest our position because they refer to preservation of objection in the disjunctive -- i.e., the defendant waived because he neither requested nor objected.

IV.

THE SOLDANO CHARGE IS IRRELEVANT AND DOES NOT BAR REVIEW

The government continues to rely on the fact that defense counsel saw -- albeit briefly -- Judge Knapp's charge in a prior case, United States v. Soldano, 71 Cr. 558, and failed to except to it. As we have argued previously, the charge was simply passed around during a bench conference on other subjects eleven days before the case went to the jury, and prior to both the government and defense requests and objections to charge; see III, supra. By the judge's own words, it was shown only

> . . . to give the gist of how I handled it.
> (3655)[21]

and when the government pointed out that Soldano, unlike Aloi,[22] "was basically a manipulation" (3657), he responded:

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[21] I. e., rather than reading the statutes, telling the jury that if it found certain facts, it must convict on the appropriate counts. While this approach may make it easier for the jury, it must, of course, include finding the fact of mens rea, which is generally prerequisite to conviction of a crime. Consistent with its "style" and the law, the court could properly have charged that if the jury found that Andrew Nelson or other conspirators willfully used a false and misleading offering circular in furtherance of the conspiracy, and Vincent Aloi was a member of that conspiracy at that time, they could find Vincent Aloi guilty of the count under a Pinkerton theory. Willful use, would of course, have to have been explained. See Govt. Request to Charge at Aloi Petition, Appendix B1.

[22] Which was basically an offering.

> The theory; I am not saying I am going to use the same charge. It is just my approach I am showing you.
> (3657)

We strongly believe that this brief "showing"[23] of the style (not the content) of a charge in a prior, somewhat similar case cannot possibly be held to bar appellants' later objection.

Distribution of a copy of the actual charge to be given prior to submission of a case to the jury would be an excellent and exemplary practice,[24] but it is not what happened here.[25] Appellant should not be

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[23]Counsel were not given copies of the charge to take and study at their leisure (as, for example they were with the government's requests to charge, and the government was with theirs), but were merely permitted to pass it among themselves while discussing several other matters (e.g., the existence of a tape between a witness and an FBI agent). The general practice of giving 3500 material to counsel at the close of the day, so they may take it to their offices and read it without interruption, followed by Judge Knapp in this case, demonstrates the court's own understanding that time and concentration are required to make sense of any written material in the heat of a trial.

[24]Imposition of such a requirement in exercise of the Court's supervisory jurisdiction would, in the future, preclude many of the problems in this and other cases, and we would strongly urge this Court to announce that rule.

[25]For example, because counsel were not simultaneously shown a copy of the indictment in Soldano, there was no way they could compare the charge on the counts to the crimes charged in the indictment. Soldano, a "manipulation" case, consisted of counts under the anti-fraud sections of the Securities Act, i.e., 77(q)(a), which provide that: " . . . it shall be unlawful for any person . . . [using the mails] . . . to employ any device, scheme or artifice to defraud." Although, in fact, 77(x) was included in the 77 counts, it was basically redundant since the intent requirement of 77 "q" or "e" (a similar provision as to sale of unregistered securities) includes and/or subsumes the willful-

(continued next page)

deemed to have waived[26] so substantial a right as if it were.

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ness requirement of 77(x). See, e.g., Tarvestal v. United States, 418 F. 2d 1043, 1047 (8th Cir. 1969), cert. den., 397 U.S. 935 (1970); United States v. Dardi, 330 F. 2d 316 (2d Cir. 1964) (using "willfully and with criminal intent" interchangeably); Gearhart and Otis Inc., v. SEC, 348 F. 2d 798, 802-803 (D. C. Cir. 1965); Tager v. SEC, 344 F. 2d 5 (2d Cir. 1965). Judge Knapp quite properly charged the required "intent" in Soldano; but this said nothing of what he would do where, as in Count 18 in Aloi, 77(x) was the sole predicate for criminal liability. Because appellate counsel, like trial counsel, did not compare the Soldano indictment with the 77q charges in Soldano, she claims that Soldano involved no 77(x) crimes (Aloi Petition for Rehearing, p. 9). While we apologize for this oversight, the confusion about this legally irrelevant detail demonstrates how inadequate a reading of the Soldano charge alone was to alert counsel to the issues in the instant case.

[26] The government here attempts to reverse decades of case law which have made it clear that, at least since Johnson v. Zerbst, 304 U.S. 458 (1938), courts should engage in every reasonable presumption against waiver, not for it.

CONCLUSION

For all of the above reasons, and the reasons previously set forth, rehearing and rehearing en banc should be granted, and the conviction on Count 18 should be reversed.

dated: New York, New York
June 17, 1975

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Monroe Rosen, being duly sworn, says that on the 18th day of June, 1975, he served a copy of the annexed Appellant's Response upon Joel Brenner, Esq., the attorney for the Appellant Ralph Lombardo herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at 150 Christopher Street, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 1521 Franklin Avenue in ~~the Borough of~~ Mineola, ~~City of~~ New York, being the address within the State therefore designated by him for that purpose.

Monroe Rosen

Sworn to before me, this
18th day of June, 1975

Milton C. Winkler

MILTON C. WINKLER
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1976